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The Role of Environmental Law and Governance in Transformational Change to Address the Triple Planetary Crisis

by Patricia Kameri-Mbote, Balakrishna Pisupati, Aphrodite Smagadi, Allan Meso, Hyun Sung & Alvin Gachie

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ABSTRACT

In 2022, the global community celebrated the fiftieth anniversary of the United Nations Conference on the Human Environment. This also marked fifty years since the establishment of the United Nations Environment Programme (UNEP). Despite progress in global, regional, and national action including the progressive development of environmental law, we are confronted with ample evidence that we are putting extreme pressures on the planet. The pressures have contributed to three interconnected planetary crises facing humanity today, namely the climate crisis, the nature crisis and the pollution crisis. These crises, driven by decades of relentless and unsustainable consumption and production, are amplifying deep inequalities and threatening our collective future. A radical shift is required in the way we design and implement environmental laws to effectively manage our environment. This calls for an enhanced science-policy interface. Environmental law plays a central role in promoting elements of science policy interface, especially in relation to policy re-design and regulatory interventions to reduce the triple planetary crises of climate change, biodiversity loss and increasing pollution. This article focuses on positioning emerging discussions on environmental law and governance using key lessons in recent approaches to environmental rule making, emphasizing integrated approaches to environmental law; identifying options for having a kaleidoscopic view of future environmental law to ensure synergistic approaches to managing the triple planetary crises and re-shaping ecological democracy from an environmental law perspective. It also addresses the role of inclusive environmental law making in the future. Looking ahead 50 years on, the paper identifies opportunities for environmental governance and environmental rule of law to contribute to addressing the triple planetary crisis.

* Law Division, United Nations Environment Programme (UNEP), Nairobi, Kenya.
Email: unep-law-director@un.org

Introduction

The year 2022 was a landmark in global environmental governance, celebrating the fiftieth anniversary of the United Nations Conference on the Human Environment held in Stockholm from 5 to 16 June 1972. Also known as the Stockholm Conference, it was the first world conference to address the issue of the environment. A hallmark of the Stockholm Conference was the establishment of the United Nations Environment Programme (UNEP) as the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment.

Yet as the global community celebrated the fiftieth anniversary of UNEP and commemorated Stockholm+50, we are still confronted with ample evidence that we are putting extreme pressures on the planet. The pressures have contributed to three interconnected planetary crises facing humanity today, namely the climate crisis, the biodiversity and nature loss crisis and the pollution crisis.¹ These crises, driven by decades of relentless and unsustainable consumption and production, are amplifying deep inequalities, and threatening our collective future.²

Climate change is destroying communities, livelihoods, economies, and ecosystems.³ Environmental law and policy frameworks to address climate change have grown significantly over the years. Still concrete action is needed, especially in adaptation and finance.⁴ At the Stock-

holm Conference it was evident that the transition of actions from science to policy and law needs more focus. Environmental law currently is a distinguishable body of law, with legal frameworks in many countries making specific reference to issues such as climate protection, nature conservation and reducing pollution. At the same time, there remains significant concern that Member States and the international community are not taking climate change as seriously as they should, including failures to uphold obligations to climate law obligations. Climate litigation cases are on the rise in various jurisdictions around the world.⁵ Various actors point to the Conference of the Parties (COP) to the UNFCCC in 2021 outcomes where some Member States championed the move to “phase down” instead of “phase out” coal use, as a draw-back to concerted efforts at transitioning to clean energy and cutting down on greenhouse gas emissions.⁶ On the positive side, other actors point to the COP to the UNFCCC in 2022 where progress was made through the breakthrough agreement to establish a “loss and damage” fund for vulnerable countries.⁷

Biodiversity and nature loss are a key focus area for environmental law and governance. Action is needed in promoting compliance and enforcement of existing legal frameworks and strengthening institutions. In 2018, the Convention on Biological Diversity (CBD) COP adopted a decision on a comprehensive and participatory process for the preparation of the post-2020 global biodiversity framework, as a stepping-stone towards the 2050 Vision “Living in harmony with nature”.⁸ The 15th COP in 2022 adopted the post-2020 framework, which holds

¹ United Nations Environment Programme, *Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies* (UNEP 2021) <<https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34948/MPN.pdf>>

² *ibid.*

³ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (IPCC 2022) <<https://www.ipcc.ch/report/ar6/wg2/downloads/>>; United Nations Environment Programme, *Adaptation Gap Report 2021* (UNEP 2021) <<http://www.unep.org/resources/adaptation-gap-report-2021>>.

⁴ Intergovernmental Panel on Climate Change (n 3); United Nations Environment Programme, *Adaptation Gap Report 2021* (n 3).

⁵ United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (UNEP 2020) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>>

⁶ UNEP, “COP26 Ends with Agreement but Falls Short on Climate Action” (UNEP, 15 November 2021) <<https://www.unep.org/news-and-stories/story/cop26-ends-agreement-falls-short-climate-action>>.

⁷ UNFCCC, *COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries* (20 November 2022) <<https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries>>.

⁸ Conference of the Parties to the Convention on Biological Diversity, *Decision 14/34. Comprehensive and participatory process for the preparation of the post-2020 global biodiversity framework*, UN Doc CBD/COP/DEC/14/34 (2018).

much promise for action on strengthening environmental law and governance to protect biodiversity.⁹

Pollution of the planet has significant implications on the fitness for use of resources for future generations.¹⁰ Lead and other chemicals cause 1.8 million deaths globally each year, and air pollution is responsible for 6.7 million deaths per year, alongside other impacts such as respiratory health problems.¹¹ Land-based pollution, for example of plastics, has been linked with the clogging of waterways, whether freshwater sources or oceans.¹² In 2023, the intersessional process considering the Strategic Approach and sound management of chemicals and waste beyond 2020 is expected to advance, leading the way in chemicals and wastes governance. Another significant contribution to address pollution, is in the Intergovernmental Negotiating Committee (INC) process agreed to at the resumed fifth session of UNEA (UNEA 5.2), where Member States decided to kickstart the process of negotiating a treaty on plastic pollution. Also, at UNEA5.2, Member States agreed that a Science Policy Panel on chemicals and waste, and to prevent pollution should be established, and initiated the process towards its establishment.

Environmental “[l]awmaking is a political process, and, particularly with respect to international law, any attempt to ignore political and economic elements would lead to obviously meaningless results”.¹³ Environmental law plays

a central role in promoting elements of science policy interface, especially in relation to policy design or re-design and regulatory interventions to address the triple planetary crises of climate change, biodiversity and nature loss and pollution. A discussion on environmental law cannot be complete without considering the political and other forces involved, including growing scientific evidence of the planetary challenges and mechanisms through which scientific findings call for action through policy and legal frameworks. Similarly, failure for environmental law-making to include formal or traditional science would lead to inadequate approaches to addressing environmental problems.

This contribution from the Law Division of UNEP argues that a radical shift is required in the way we design and implement environmental laws to effectively manage our environment, necessitating an enhanced science-policy interface. It focuses on positioning emerging discussions on environmental law and governance using key lessons in recent approaches to environmental rule making, emphasising integrated approaches to environmental law. Synergistic approaches in environmental law are necessary to address the triple planetary crises and re-shape ecological democracy. Inclusive environmental law making is key to ensuring a future that protects those most vulnerable to the effects of environmental degradation.

⁹ Conference of the Parties to the Convention on Biological Diversity, Kunming-Montreal Global biodiversity framework - Draft decision submitted by the President, UN Doc CBD/COP/15/L.25 (2022).
Draft decision submitted by the President.

¹⁰ Richard Fuller and others, “Pollution and Health: A Progress Update” (2022) 6(6) *The Lancet Planetary Health* E535 <<https://linkinghub.elsevier.com/retrieve/pii/S2542519622000900>>; United Nations Environment Programme, *Towards a Pollution Free Planet: Background Report for the Third Session of the United Nations Environment Assembly (UNEP 2017)* <https://wedocs.unep.org/bitstream/handle/20.500.11822/21800/UNEA_towardspollution_long%20version_Web.pdf?sequence=1&isAllowed=y>.

¹¹ Fuller and others (n 10) 536.

¹² Alvin Gachie, “Environmental Governance and the Global Plastic Pollution Problem: Driving Kenya Towards a Circular Economy” (2020) 4(4) *Journal of Conflict Management and Sustainable Development* 71 <<http://journalofcmsd.net/wp-content/uploads/2020/06/Environmental-Governance-and-the-Global.pdf>>

¹³ Arghyrios A Fatouros, “International Law and the Third World” (1964) 50 *Virginia Law Review* 783, 785

Key Lessons in Recent Approaches to Environmental Rule Making: Emphasising Integrated Approaches to Environmental Law

Since June 1972, there have been significant milestones in the evolution of environmental governance and the realisation of institutional developments. Stockholm+50 was presented an opportunity for reflection on the achievements in environmental law and governance to date, and on the road ahead to secure a safe and healthy planet.¹⁴

During the first phase of the development of international environmental law most of the treaties that were developed were purely utilitarian in character; efforts at protecting or conserving specific species were motivated largely by their usefulness rather than environmental protection per se. But by the late 1960s, a period that arguably represents the emergence of a second phase of the development of international environmental law, serious concerns were being expressed about growing evidence of environmental degradation and it was realised that this degradation was closely linked to unsustainable levels of economic development and population growth.

A key development in the international environmental governance framework, was the 2013 expansion of membership to the governing body of UNEP. In 2023, UNEA, a body with universal membership, governs the environmental agenda in the UN system, and as such UNEP's environmental governance and environmental law priorities. In 2022, the Montevideo Environmental Law Programme, now in its fifth iteration, marked 40 years and held the first in-person meeting of National Focal Points to agree on areas of focus on the progressive development of environmental law.¹⁵ A significant achieve-

ment of the Montevideo Environmental Law Programme, was the designation of National Focal Points, thus making the programme a truly Member-State-driven process, as Member States are the primary actors in the international environmental law space.

Since 1972, the number of bilateral and multilateral environmental agreements has grown, reaching over three thousand.¹⁶ Increasing legal protections deriving from the proliferation of multilateral environmental agreements (MEAs) in the past 50 years is witness to a firm acknowledgment of the transboundary nature of environmental challenges and the need for collective action through the law. The notable evolution from MEAs that deal with a specific species or habitat to a more general approach covering aspects such as climate change and biodiversity demonstrates a recognition of the overarching and crosscutting nature of environmental law required to deal with these interconnected crises.¹⁷ The United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD), and the United Nations Convention to Combat Desertification (UNCCD) - the three Rio Conventions - are examples of MEAs acknowledging the intrinsic links between planetary challenges. Within their respective governing bodies, integrated approaches such as nature-based solutions to achieve positive biodiversity, health, and climate change outcomes are increasingly offered as cross-cutting responses.¹⁸

A framework convention and protocol approach towards conclusion of MEAs has been witnessed in the field of international environmental law.¹⁹ Under this approach, the

¹⁴ United Nations Environment Programme, "Stockholm+50" (Stockholm+50) <<http://www.stockholm50.global/node/2>>

¹⁵ United Nations Environment Programme, Marking 40 Years of the Montevideo Programme and 50 Years of Environmental Law on 31 May 2022 (UNEP 2022) <<http://www.unep.org/events/symposium/marking-40-years-montevideo-programme-and-50-years-environmental-law-31-may-2022>>; United Nations Environment Programme, In-Person (Hybrid) Segment of the First Global Meeting of National Focal Points (UNEP Law and Environment Assistance Platform 2022) <<https://leap.unep.org/about/meetings/person-hybrid-segment-first-global-meeting-national-focal-points>>

¹⁶ Ronald B Mitchell and others, "What We Know (and Could Know) About International Environmental Agreements" (2020) 20(1) Global Environmental Politics 103

¹⁷ Elizabeth Maruma Mrema and Aphrodite Smagadi, "The United Nations Environment Programme - Promoting Climate Law Education in the Middle East and North Africa" in Damilola S Oluwuyi (ed), Climate Change Law and Policy in the Middle East and North Africa Region (1st edn, Routledge 2021)

framework MEA covers the issue broadly, maintaining the space for the main convention to be supplemented by protocols and other agreements. This has been touted as a mechanism to address the need to reach consensus, where the overarching mechanism may be agreed to by most Member States, and contentious aspects left for consideration at a later stage. Under the UNFCCC, the Paris Agreement is an international legally binding instrument with various provisions of voluntary nature, for example leaving nationally determined contributions (NDCs) to the discretion of States Parties.²⁰ This has been seen to create challenges in interpreting provisions and defining the obligations for States Parties' implementation, despite the treaty being adopted by consensus. Questions arise on whether this is an efficient model, as variance in the level of obligations to a treaty may contribute to differences in the application of the treaty, resulting in varied environmental outcomes.

In national environmental rulemaking, a notable trend is the creation of framework environmental laws which provide for the development of subsidiary legislation. While it is a good approach to set out the umbrella provisions in a framework environmental law, if the subsidiary legislation is not developed, or certain provisions left unaddressed in the subsidiary legislation, then the law falls short of its ambition and cannot be implemented as such.

Environmental law, while today a self-standing area of law, needs for its protection attention to the overall map of legal frameworks. Environmental matters may also be regulated by other areas of law, for example health, energy, and intellectual property. Member States must ensure there is complementarity between environ-

mental law and other areas of law to avoid conflicts. For example, strengthening environmental protection has clear co-benefits for health outcomes. A critical reflection on the impacts of actions on public health and the environment is necessary, demonstrating the development of environmental law and the linkages drawn with health considerations. An important contribution to the public opinion and calls for protection of the ozone layer, was the effect on health and the impacts of exposure to UV radiation from sunrays caused by stratospheric ozone depletion, resulting in skin cancer.²¹ The Montreal Protocol and its Kigali Amendment, addressing CFCs and HCFCs, not only deliver positive results in curbing ozone depletion, but marked co-benefits of reduction of climate change through mitigating anthropogenic releases of greenhouse gases.²²

Air pollution is linked with respiratory problems, cardiovascular diseases, reproductive and central nervous system dysfunctions, and other health implications,²³ necessitating action through air pollution legislation,²⁴ drawing benefits for health and the environment. Climate change has a direct impact on the social determinants of health, where lack of water and food due to changing rain patterns, for example, contributes to deterioration in the quality of life, rise in incidents of heat stress, and other negative impacts on agriculture and sanitation, leading to negative health outcomes.²⁵ Protection of biodiversity has a positive impact on health out-

¹⁸ World Bank, "What You Need to Know About Nature-Based Solutions to Climate Change" (World Bank, 19 May 2022) <<https://www.worldbank.org/en/news/feature/2022/05/19/what-you-need-to-know-about-nature-based-solutions-to-climate-change>>; Ali Raza Rizvi and Kirstin van Riel, "Nature Based Solutions for Climate Change Adaptation – Knowledge Gaps" (2017) IUCN Working Paper; Convention on Biological Diversity, Report of the Regional Workshop on the Interlinkages between Human Health and Biodiversity for the European Region, UN Doc CBD/HB/WS/2017/1/2.

¹⁹ Nele Matz-Lück, "Framework Conventions as A Regulatory Tool" (2009) 1(3) Goettingen Journal of International Law 439 <https://www.gojil.eu/issues/13/13_article_matz-lueck.pdf>.

²⁰ Daniel Bodansky, "Paris Agreement" (United Nations 2021) <https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf>

²¹ Ioannis Manisalidis and others, "Environmental and Health Impacts of Air Pollution: A Review" (2020) 8 *Frontiers in Public Health* <<https://www.frontiersin.org/article/10.3389/fpubh.2020.00014>>; Frederike Albrecht and Charles F Parker, "Healing the Ozone Layer: The Montreal Protocol and the Lessons and Limits of a Global Governance Success Story" in Paul't Hart and Mallory Compton (eds), *Great Policy Successes* (Oxford University Press 2019) 304

²² RE Neale and others, "Environmental Effects of Stratospheric Ozone Depletion, UV Radiation, and Interactions with Climate Change: UNEP Environmental Effects Assessment Panel, Update 2020" (2021) 20(1) *Photochemical & Photobiological Sciences* 1

²³ Manisalidis and others (n21 1)

²⁴ United Nations Environment Programme, "Regulating Air Quality: The First Global Assessment of Air Pollution Legislation" (UNEP 2021) <<http://www.unep.org/resources/report/regulating-air-quality-first-global-assessment-air-pollution-legislation>>.

²⁵ Intergovernmental Panel on Climate Change (n 3); World Health Organization, "Climate Change and Health" (World Health Organization, 30 October 2021) <<https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>>

comes, improving sources of pharmaceutical products, clean water, food, and nutrition, among other benefits.²⁶

Critical reflections on evolving environmental governance and institutional developments must be offered. For example, trends in linking pollution and health impacts such as the One Health approach have yielded results, drawing calls for action to protect the environment based not only for their benefits to the environment, but from an anthropocentric perspective, their impacts on human health. UNEP's mandate to convene an Intergovernmental Negotiating Committee towards agreeing to a treaty on plastic pollution, and the process towards a Science-Policy Panel on chemicals and wastes and to prevent pollution, are two examples of processes which recognise the need for strong environmental governance, and creating new legal instruments and institutional structures, to address environmental problems. Not only does this demonstrate that existing efforts of translating science to policy, have been inadequate, necessitating further legal and institutional structure, but also that the role of environmental law and governance in addressing environmental problems is ever-present.

Reshaping Ecological Democracy from an Environmental Law Perspective

The idea of ecological democracy seeks to balance the conduct of industrial humanity with nature, forge a path for better management of industrialised societies, and meet the environmental, social, and economic challenges and opportunities posed by economic growth.²⁷ Environmental democracy combines two sets of values: environmental concerns and protection, and democratic legitimacy and procedure.²⁸ Environmental policy and law making and translating science into action, is often perceived as too slow and cumbersome to deliver intended outcomes.²⁹ There is arguably an antagonism between rapid action to address environmental problems and the slow democratic process needed for inclusive policies and legal actions to materialise.³⁰

There is a shift both at the national and international levels towards increased recognition of the centrality of environmental rights as a safeguard for ecological democracy. Aside from recognition of substantive human rights relating to the environment, procedural rights such as access to information, public participation in decision-making and access to justice in environmental matters are some of the rights enshrined in the legal frameworks of over 150 countries around the world and part of regional and international instruments as well. In October 2021, the UN Human Rights Council recognised the right to a healthy environment, and discussions are underway at the time of submission of this

²⁶ World Health Organization Regional Office for Europe and World Health Organization, "Nature, Biodiversity and Health: An Overview of Interconnections" (WHO 2021)

²⁷ Roy Morrison, *Ecological Democracy* (South End Press 1995)

²⁸ David Schlosberg, Karin Bäckstrand and Jonathan Pickering, "Reconciling Ecological and Democratic Values: Recent Perspectives on Ecological Democracy" (2019) 28 *Environmental Values* 1.

²⁹ Jonathan Pickering, Karin Bäckstrand and David Schlosberg, "Between Environmental and Ecological Democracy: Theory and Practice at the Democracy-Environment Nexus" (2020) 22(1) *Journal of Environmental Policy & Planning* 1

³⁰ *ibid* 10

chapter, with the aim of such recognition being reached at the UN General Assembly.

At the national level, there are examples of regional instruments that call for the protection and promotion of access rights in the respective regional Member countries. The United Nations Economic Commission for Europe (UNECE) Aarhus Convention³¹ and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)³² are frontrunners in this regard, with the European and Latin American and Caribbean Member countries respectively, implementing this approach. Protection of environmental defenders is a key component of ecological democracy processes that offer not only access to justice for environmental defenders, but positive protection of their rights to defend the environment and human rights without fear of reproach.

At the international level, there have been calls for more open international process allowing for different interest groups to attend and provide their views to the negotiating states, for example at the UNFCCC COPs and CBD COPs. A trend is emerging where intergovernmental processes are accompanied by very rich side discussions with stakeholders, organised as parallel platforms and events. The increased role of stakeholder participation in environmental rulemaking has piqued interest, raising the question of whether there is evidence of a change in the global governance framework.

The position of observer status is an area for consideration, as seen in some regional instruments that promote the participation of observers in international law-making. The Aarhus Convention mandates States Parties to “promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment”.³³ Pursuant to this

provision, States Parties in 2005 adopted the Almaty guidelines on promoting the principles of access to information, public participation in decision-making and access to justice in international forums dealing with matters relating to the environment.³⁴ The Convention also provides for each State Party to take measures within its legislation to disseminate national and subnational environmental laws and policies, international environmental laws, and other significant environmental documents.³⁵ Dissemination of environmental laws and other laws relating to the environment, for example trade, health, transport, energy, agriculture, or mining laws, contributes to providing the public with adequate information to support mobilisation for State action at the international level.³⁶ According to the rules of procedure of the Aarhus Convention, one NGO representative elected by the COP is invited to the Bureau to attend bureau meetings as an observer.³⁷ This provides an avenue for civil society actors in the field of environment and sustainable development to participate as an observer in the decision-making body of the Convention.

The ILO model has been offered as a possible framework for inclusive law-making, placing the interests of States, employers, and workers at the table in a tripartite arrangement. States are the primary decision-makers and Parties to the ILO Conventions. However, international labour standards are supervised through a tripartite system including States, employers, and workers, where recommendations consider the voices of the affected parties.³⁸ Applied to environmental law-making, such an arrangement

³¹ Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, Aarhus, 25 June 1998.

³² Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018.

³³ Aarhus Convention (n 31) Art 3(7).

³⁴ Promoting the application of principles of the Aarhus Convention in International Forums 2005.

³⁵ Aarhus Convention (n 31) Article 5(5).

³⁶ United Nations Economic Commission for Europe (ed), “The Aarhus Convention: An Implementation Guide” (2nd edn, United Nations 2014) 110.

³⁷ United Nations Economic Commission for Europe, “Note on Civil Society Space” (UNECE 2018) <<https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/Procedures/UN/UnitedNationsEconomicCommissionEurope.pdf>>.

³⁸ International Labour Organisation, “International Labour Standards on Tripartite Consultation” (International Labour Organisation 2022) <<https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang--en/index.htm>>.

may contribute to better compliance and enforcement through improved dialogue and ownership of outcomes of the decision-making processes.

The Role of Inclusive Environmental Law Making in the Future

International environmental rulemaking developed from its nascency with the embedded recognition of the impossibility to separate economic development from social and environmental protections. In the 1970s and onwards, as evidenced through the concept of sustainable development, legal protection of people and planet emerged as an aim of environmental law, offering a shield for the environment, society, and economies. A common thread in international environmental law and governance, from the Stockholm Conference in 1972, developed through the Rio Conference in 1992, the World Summit on Sustainable Development in Johannesburg in 2002, Rio+20 in 2012, Agenda 2030, and the Sustainable Development Goals (SDGs), is the widely accepted notion that if we continue business as usual, with the same economic considerations trumping environmental and social concerns, we will lose the opportunity to turn back the tide on the most pressing planetary challenges of our time. However, we are far off the mark from achieving the objectives of environmental law protection and SDGs, noting that the period between the year 2020 and 2030 is the Decade of Action.

The Rio Declaration on Environment and Development, building on the Declaration adopted at the Stockholm Conference, was a major landmark in international environmental law and essential in systematising the principles of environmental law.³⁹ Over the years, there have been calls to codify the principles of environmental law to give legal effect to them and contribute to justiciability of environmental duties

³⁹ Günther Handl, "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992" (United Nations 2012).

and rights.⁴⁰ The Global Pact for the Environment project at the United Nations General Assembly level, had the drive, but arguably insufficient political will, to achieve such codification. General Assembly Resolution 73/333, which later led to adoption of a Political Declaration at UNEP@50, is an expression of the ambition noted as far back at the Stockholm and Rio Conferences, to develop a global legal framework for environmental protection.⁴¹ The Rio Principles were included in the Political Declaration, which while not a resolution of UNEA, holds a place among soft law instruments in the international environmental law space.

States are the primary decision-makers in international environmental law-making and governance. For example, according to the rules of procedure of UNEA, all States members of the United Nations negotiate and participate in the decision-making, while specialised agencies, states members of specialised agencies, the IAEA, UN bodies, other intergovernmental organisation and international non-governmental organisations, including stakeholders representing the civil society and businesses may be invited to participate in the deliberations and express their views, but may not to actively negotiate text. Calls for dynamic interactions between science and policy, and fostering a systemic approach to deliberative democratisation seek a move beyond specific instances of deliberation such as consultations under environmental impact assessment frameworks, to a wholesome approach to deliberation by embedding values such as inclusiveness in environmental law-making and governance frameworks.⁴² Principle 10 of the Rio Declaration on Environment and Development access to information, public participation in decision-making and justice in environmental matters, noting that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at

⁴⁰ Yann Aguila, "A Global Pact for the Environment: The Logical Outcome of 50 Years of International Environmental Law" (2020) 12(14) Sustainability 5636.

⁴¹ Yann Aguila and Jorge E Viñuales, "A Global Pact for the Environment: Conceptual Foundations" in Yann Aguila and Jorge E Viñuales (eds), *A Global Pact for the Environment - Legal Foundations* (University of Cambridge 2019) 12

⁴² Monika Berg and Rolf Lidskog, "Deliberative Democracy Meets Democratised Science: A Deliberative Systems Approach to Global Environmental Governance" (2018) 27(1) Environmental Politics 1

the relevant level".⁴³ Inclusion of all concerned stakeholders in environmental law making is essential not only in specific points in the decision-making processes, but in the entire process based on principles of environmental law.

There is also a noted shift in the traditional way of participation of observers in intergovernmental processes, where observers are given the floor after the States Parties. For example, at the Bonn Climate Change Conference from 6 to 16 June 2022, observer statements alternated with those by Parties.⁴⁴ Inclusive environmental law-making affords respect for a diverse range of actors to contribute to environmental governance processes.⁴⁵ The role of non-state actors in international environmental law-making deserves attention, as solutions increasingly depend on their involvement in deliberations and accountability for their commitments.⁴⁶ For example, some civil society actors decried the large delegations of companies at the Climate COP in Glasgow, with ability to follow discussions in different rooms and lobby their respective governments, compared to the relatively smaller delegations from some States.⁴⁷ Some non-state actors argued that their voices were missing from the debate because of COVID-19 travel restrictions and financial restraints.⁴⁸ However there were also concerns raised a year later with the Climate COP in Sharm el-Sheikh, with calls to address civil society involvement in

the talks based on reports of lack of information on restrictions on participation.⁴⁹ Yet from a strict view of the letter of the law, albeit ignoring the social and political underpinnings, non-state actors as well as all States were afforded the opportunity to participate in the debates, including through online tools. In the OEWG process towards negotiating a treaty on plastic pollution, the role of all stakeholders must be evaluated to ensure an inclusive outcome that addresses the interests of States, civil society, businesses, and other outcomes.

There is an increasing need to reflect and possibly revisit the notion of stakeholders/observers in international environmental decision-making process. The 1992 Rio Conference recognised that achieving sustainable development would require participation of all sectors of society, and the adopted Agenda 21 formalised nine "Major Groups"/sectors of to enable stakeholder participation, including women, children and youth, indigenous peoples, non-governmental organisations, local authorities, workers and trade unions, business and industry, scientific and technological community, and farmers.⁵⁰ Accreditation to participate in intergovernmental processes is usually contingent upon registration or incorporation of some form of organisation or association in a certain jurisdiction. This, however, fails to include the informal sector, which accounts for about a third of GDP and more than 70 percent of employment in several emerging market and developing economies.⁵¹

UNEA Resolution 5/14 titled "End plastic pollution: Towards an international legally binding instrument" that set the negotiation process for an international legally binding instrument on plastic pollution, including in the marine environment, recognises in its preamble "the significant contribution made by workers in informal and

⁴³ Rio Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26/Rev. 1 (Vol. I), Annex II (1992), Principle 10

⁴⁴ International Institute for Sustainable Development, "Bonn Climate Change Conference - June 2022" (IISD Earth Negotiations Bulletin 2022) <<https://enb.iisd.org/bonn-climate-change-conference-sbi56-sbsta56>>

⁴⁵ United Nations, *Our Common Agenda - Report of the Secretary-General* (United Nations 2021) 68

⁴⁶ *ibid*

⁴⁷ Global Witness, "Hundreds of Fossil Fuel Lobbyists Flooding COP26 Climate Talks" (Global Witness, 8 November 2021) <<https://www.globalwitness.org/en/press-releases/hundreds-fossil-fuel-lobbyists-flooding-cop26-climate-talks/>>

⁴⁸ Democracy Without Borders, "Civil Society Marginalized at COP26 Climate Negotiations in Glasgow" (Democracy Without Borders, 12 November 2021) <<https://www.democracywithoutborders.org/ke/21159/civil-society-marginalized-at-cop26-climate-negotiations-in-glasgow/>>; Sarah Steffen and Ajit Niranjana, "Environmentalists Say COP26 is Overwhelmingly White and Rich" DW (3 November 2021) <<https://www.dw.com/en/cop26-climate-conference-glasgow-delegates-representation-global-south/a-59708405#:~:text=The%20countries%20hit%20hardest%20by, chance%22%20to%20stop%20global%20warming.>>>

⁴⁹ United Nations, Egypt urged to ensure civil society's full participation in COP27 climate summit (United Nations, 7 October 2022) <<https://news.un.org/en/story/2022/10/1129332>>.

⁵⁰ United Nations, "About Major Groups and Other Stakeholders" (Sustainable Development Knowledge Platform) <<https://sustainabledevelopment.un.org/aboutmajorgroups.html>>

⁵¹ World Bank, "As COVID-19 Wreaks Havoc on Service Workers, is the Informal Sector Increasing Global Inequality?" (24 May 2021) <<https://www.worldbank.org/en/news/podcast/2021/05/24/as-covid-19-wreaks-havoc-on-service-workers-is-the-informal-sector-increasing-global-inequality-the-development-podcast>>

cooperative settings to the collecting, sorting and recycling of plastics in many countries” and “[s]tresses the need to ensure the widest and most effective participation possible in the work of the ad hoc open-ended working group and of the intergovernmental negotiating committee” (para. 6). It remains to be seen how the elements of the widest and most effective participation will be operationalised in the work of the Intergovernmental Negotiating Committee. The UN Secretary General calls for more networked and inclusive multilateralism as a more effective avenue to addressing the pressing issues of the 21st century.⁵² Inclusion of relevant stakeholders in decision-making is important for wider democratic input into environmental law and policy frameworks, and improved substantive efficiency of environmental outcomes.⁵³ Compliance and enforcement of environmental law instruments may be improved through promoting inclusion of interests as a precursor to alignment of priorities by the stakeholders to uphold the objectives of the respective instruments.

The interrelation between human rights and the environment, now well recognised at the international, regional, and national levels, was not so, at the Stockholm Conference. On 28 July 2022, the UN General Assembly adopted a resolution recognising the right to a clean, healthy, and sustainable environment, as a human right.⁵⁴ Previously, in October 2021, the UN Human Rights Council adopted a resolution recognising the right to a health environment. At present, the right is enshrined in constitutions and legal frameworks of over 150 countries. Recognition of this right is to be considered by the General Assembly. This is a milestone in the protection of the rights relating to the environment, including the right to life, health, food, water, and related rights. Recognition of this right at the General Assembly, providing similar standing to the human rights under the Convention on Civil and Political Rights, and Economic, So-

cial and Cultural Rights, would go a long way in safeguarding protection of rights-holders, including environmental rights defenders.

Protection of human rights relating to the environment does not hold true to its objectives if those most vulnerable to the impacts of the planetary crises, are left without recourse for environmental injustices. Inclusive environmental law-making safeguard the opportunity for States from all regions to engage, with specific concern for having developing countries afforded comparable access to environmental governance processes as developed countries.⁵⁵ As treaty-making is between States, the different capabilities between States, for example between developed and developing countries, for example, is an area deserving attention.⁵⁶ Where developing countries do not have comparable access to the conference rooms where negotiations of MEAs that determine whether the voices of their citizens are translated into resolutions or recommendations, as the access afforded to developed countries and businesses, this brings into question the extent to which the growth of environmental law truly reflects inclusivity. Some treaties call for common but differentiated responsibilities for developing and developed countries.⁵⁷ Another opportunity to contribute to addressing imbalances in interests, is through having a Bureau to a treaty including one member State from a group of countries needing special attention. For example, the UNFCCC bureau has one member State representing Small Island Developing States (SIDS). Sea level rise, changes in rainfall patterns, and other devastating impacts of climate change on SIDS, necessitates their increased involvement and participation in international law-making and decision-making. Similar arrangements towards inclusive law-making may be considered in the process towards a treaty on plastic pollution.

⁵² United Nations (n 45) 66

⁵³ Peter Schlyter, Ingrid Stjernquist and Harald Sverdrup, “Handling Complex Environmental Issues – Formal Group Modelling as a Deliberative Platform at the Science-Policy-Democracy Interface” (Systems Dynamics 2012)

⁵⁴ United Nations, “UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right” (United Nations, 28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>>

⁵⁵ United Nations (n45) 68

⁵⁶ Handl (n 39) 5

⁵⁷ *ibid*

Conclusion and Way Forward

As we forge ahead after UNEP@50, and Stockholm+50, recognising where environmental governance and environmental rule of law stands 50 years on, we must also share some thoughts for the future 50 years. The years ahead hold significant promise, and at the same time there needs to be concerted action, towards addressing the triple planetary crisis of climate change, biodiversity loss, and pollution.

The evolution and future of international environmental law on the one part, and of global environmental governance on the other part, are interlinked.⁵⁸ As discussed above, environmental law-making is done in the same spaces that environmental policy is shaped, thus embedding elements of social, economic, and political life in legal instruments. The role of environmental law must be considered in the context of environmental diplomacy, with a focus instead of the traditional state-centric approaches of Member States developing new laws through environmental governance platforms, towards broad, inclusive, fit-for-purpose solutions to environmental challenges in diverse platforms.⁵⁹ This calls for a review of the transformative nature of law, and in various instances looking beyond the law for solutions to planetary challenges.⁶⁰

Since 1972 there has been an increase in the number of MEAs, on various issues and with different geographical reach. From the Montreal Protocol and Kigali Amendment seeking to protect the ozone layer, to the UNFCCC and the Paris Agreement, and the Convention on Biological Diversity, MEAs have established a mostly sectoral and fragmented protection of the environment. The contribution of MEAs to the environmental law framework is undisputed. MEAs have created the governance mechanisms where Member States discuss and agree on pri-

orities, providing soft law recommendations and decisions driving political will. MEAs have driven financing towards achievement of environmental goals, through championing commitments by States Parties to meet their commitments through financial contributions.

In recent years, MEAs have contributed to acknowledging the interrelatedness of the planetary crises, for example through inclusion of nature-based solutions in climate change COP discussions and calls for the treaty on plastic pollution to incorporate aspects for climate action, and biodiversity protection. Yet there remain significant opportunities, for example, for analysis of how future targets under the biodiversity post-2020 framework, and the chemicals beyond-2020 framework guide UNEP's work in implementing its mandate including on progressive development of environmental law. Synergies between MEAs and UNEP, and between MEAs themselves, is an area that has been recognised for attention by Member States on various occasions and remains a key area for action to harness the potential of MEAs, especially those that UNEP provides secretariat services to.

The role of the environmental governance and environmental rule of law, in addressing the triple planetary crisis is increasingly in focus. A key consideration is how environmental governance and environmental rule of law interventions can be designed to be fit-for-purpose and be best leveraged so that action under specific programmes can be scaled up. Specific consideration must be given for how developing countries, with competing development agenda, can incorporate environmental considerations most appropriately in their legal and policy frameworks. A focus on promoting implementation and enforcement of environmental law to catalyse and accommodate environmental action must be adopted. For environmental law-making to be inclusive, conveners must increasingly consider establishing and maintaining standing mechanism for engagement and consultation of non-state actors including civil society and businesses, with due regard for the sovereignty of Member States and their role as primary decision-makers in international law.⁶¹

⁵⁸ David Kenneth Leary and Balakrishna Pisupati (eds), *The Future of International Environmental Law* (United Nations University 2010) 292

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ United Nations (n45) 75

Environmental justice is as a key component of environmental rule of law and environmental governance, contributing to achieving SDG16 on peace, justice, and strong institutions. The right to an effective remedy is essential to ensuring that failure in compliance with or enforcement of environmental law, is met with justice for the rights-holders. At an international level, calls for recognition of a crime of “ecocide” under the International Criminal Court, while a matter that has been the subject of debate for decades, from some interlocutors holds promise in holding perpetrators of unwarranted largescale destruction of the environment, to account. In times of peace, some actors have called for widespread illegal logging in the Amazon Forest, for example, to have legal redress through recognition of such a crime under international law. At the national level, environmental crime cases are heard before various courts, yet the transboundary nature of some of these crimes, as well as their close relationship with other criminal activity such as human trafficking and arms dealings, make these cases difficult to effectively prosecute.

The future of international environmental law and governance is one that adopts a “multifaceted and multidimensional evolutionary process”, building on existing processes, and creating new pathways, establishing new partnerships, and new instruments and tools towards addressing environmental challenges.⁶² Inclusive environmental decision-making recognises the transboundary nature of environmental challenges, transcending not only spatial borders of geographical limits, but also temporal borders, affecting present and also future generations.⁶³ Increased citizen participation including of indigenous peoples, children and youth demanding action on their behalf and on behalf of future generations and non-humans, and demanding action from Member States to uphold their obligations under legal frameworks such as the UNFCCC, holds promise for the continued exercise of environmental democracy to achieve sustainable development.⁶⁴ Member States must increasingly heed the call for increased in-

tergenerational dialogue, to give a more central voice to the present and future generations, whose futures international environmental law-making and governance claims to seek to protect. As an old Greek proverb goes:

“A society grows great when old [women and] men plant trees in whose shade they know they shall never sit”.

Looking ahead 50 years on, various opportunities exist for environmental governance and environmental rule of law to contribute to addressing the triple planetary crisis. In the short term, moving forward:

- UNEP will contribute to climate stability by promoting the environmental rule of law to help achieve the aims of the UNFCCC and the Paris Agreement. National governments will be supported through the promotion of information and data exchange, education, capacity-building and technical assistance, to strengthen national environmental governance systems and improve the rule of law, with the aim of fully implementing the Paris Agreement.
- UNEP will make living in harmony with nature a reality by supporting countries in developing legislation that has impact. Countries will receive support in developing the necessary policies, laws, and strategies to implement their respective obligations under MEAs in a coherent manner while strengthening national institutions and mechanisms for monitoring and reporting on related progress. In this context, UNEP will provide guidelines and tools for effective implementation.
- UNEP will progress towards a pollution-free planet by advocating for and supporting legal frameworks and their implementation regarding the right to a clean, healthy, and sustainable environment. Countries will receive support in developing the necessary policies, laws, and strategies to implement their respective obligations under MEAs in a coherent manner. In this context, UNEP will provide guidelines and tools for effective im-

⁶² Leary and Pisupati (n 58) 295

⁶³ Berg and Lidskog (n 42) 1

⁶⁴ Pickering, Bäckstrand and Schlosberg (n 29) 7,8

plementation. The Montevideo Environmental Law Programme can accelerate shifts towards the sound management of chemicals and waste, including plastic pollution, with a focus on the environment and health nexus. UNEP will continue to support human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.

- UNEP will use the science-policy interface to support strong environmental governance. UNEP will contribute to the promotion of information and data exchange, education, capacity building and technical assistance, to strengthen national environmental governance systems and improve the environmental rule of law based on proven scientific evidence.
- UNEP will promote integration of the environmental dimension of sustainable development when supporting financial and economic transformations. Strengthening the environmental dimension of economic policy decisions will contribute to enhanced coherence in approaches to sustainable development and the uptake of sustainable development in national planning and policymaking. It will also assist countries in drawing up and implementing effective policy and enabling frameworks that cut pollution through cleaner economic activities that also reduce biodiversity loss.
- UNEP will use digital transformation for coherent and inclusive environmental governance. UNEP will accelerate support for the scale-up of knowledge management and data reporting at the national level. This will support countries in the coherent implementation of MEAs and increase the understanding of the data linkages between climate change, biodiversity loss and pollution in the context of sustainable development, including as it pertains to human health.

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